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LIABILITY FOR THE UNAUTHORIZED TORTS OF AGENTS.

NO other part of the law of principal and agent is in such intolerable confusion as that which concerns the nature and extent of the liability of the principal for the tortious actions of the agent when done without either actual or apparent authority from the principal. There can be no question as to the liability of the principal for the agent's tort that has been actually authorized or ratified, nor should there be any difficulty in holding the principal liable for such unauthorized torts of his agent as were committed under circumstances that induce a reasonable belief on the part of the third party dealing with the agent that the principal had authorized the act in question. That is to say, the principal is estopped to deny responsibility for tortious acts done by the agent within the apparent scope of his authority. On this theory the principal becomes liable for a false representation made by his agent in negotiating a sale of his principal's property. The principal may not have authorized such a misrepresentation, and may be personally wholly innocent of it; yet, having given to the agent authority to make a sale of the property the purchaser would have a reasonable ground for believing that the agent was also authorized to make such usual representations with reference to it as might be necessary to procure its sale.¹

A very different case, however, exists when the circumstances of the transaction do not justify the third party in thinking that the wrongful action of the agent has been authorized by the principal. The act complained of has not been authorized by the principal, nor has the principal done anything that would make it appear that he had authorized such action. On what theory can the principal then be held liable for the agent's tort? Some typical cases may be stated in order to illustrate the difficulty. The agent of a railway company fraudulently issues bills of lading without having received the goods described therein. The person who, in collusion with the agent, receives the bills of lading, makes use of them in order to secure the sale of a draft drawn upon the supposed consignee. The holder of the bills of lading, who has taken them in good faith and for value, upon the non-delivery of the goods which the bills of lading state to have been received by the railway company, brings an action against the company in deceit. In such a case is there any sound principle upon which the railway company can be held liable for the deceit practiced by the agent wholly without authority? It

¹ *Haskell v. Starbird*, 152 Mass. 117.

is clear that the issue of bills of lading by the agent of a carrier without the receipt of the goods specified is not even apparently authorized. Again, the secretary of a corporation, having authority to counter-sign certificates of stock, thus attesting their genuineness, for his own fraudulent purposes, issues spurious certificates, which are offered to a bank as collateral for a proposed loan. The officers of the bank make inquiry of the corporation as to the genuineness of the stock certificates offered to it, and are informed by the secretary of the corporation that they are genuine. Here again, the agent is guilty of a tortious act which has not been authorized by the principal, either actually or apparently. These cases are but types of great numbers of cases that have been adjudicated by our courts with such diverse results based upon such confused reasoning, as to justify, in view of the great importance of the questions involved from a commercial as well as a scientific standpoint, a careful examination and earnest effort to discover a firm principle upon which the decisions may be reduced to harmony and certainty.

In the case of bills of lading fraudulently issued by agents of carriers without the receipt of the goods the decisions of the Supreme Court of the United States and of the Court of Appeals of New York are diametrically opposed.² The reasoning of neither court is satisfying. That of the Supreme Court of the United States leads us to a conclusion that does violence to our sense of justice and seems clearly contrary to the welfare of commercial interests, while that of the Court of Appeals of New York, though leading to a more satisfactory conclusion, seems to proceed upon an unsound principle.

The reasoning of the Supreme Court cases and of the leading English case, *Grant v. Norway*,³ which the Supreme Court cases follow, may be thus briefly stated: The agent of a carrier has authority to issue bills of lading only upon receipt of the goods to be carried, and no one supposes that he has authority to bind his principal by the issue of bills of lading without the receipt of the goods, nor do the facts of any of the cases show that the principal had done anything from which third persons would have reason to think that such authority had been given. The fraudulent bills of lading having thus been issued without either actual or apparent authority, the principal cannot be held liable either in contract on the bills as issued or for the deceit of the agent in falsely representing that the goods had been shipped. In the language of the Court

² Compare *The Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. 7; *Friedlander v. Texas & Pacific Railway Co.*, 130 U. S. 416, with *Armour v. Railway Co.*, 65 N. Y. 111; *Bank of Batavia v. N. Y., L. E. & W. R. Co.*, 106 N. Y. 195.

³ 10 C. B. 665.

in *Pollard v. Vinton*,⁴ the question is one "of pure agency and depends solely on the power confided to the agent." So in *Grant v. Norway*,⁵ JERVIS, C. J., bases the conclusion reached solely upon the principle of agency, saying:

"It is not contended that the captain had any real authority to sign the bills of lading, unless the goods had been shipped: nor can we discover any ground upon which a party taking a bill of lading by endorsement, would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not. * *

* * The general usage gives notice to all people that the authority of the captain to give bills of lading, is limited to such goods as have been put on board; and a party taking a bill of lading, either originally, or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."

If the question is viewed as one of pure agency, it seems difficult to escape this reasoning. The New York courts, however, endeavor to justify a different conclusion by laying down a new rule of agency, which may be thus stated, in the language of FINCH, J.:⁶

"It is a settled doctrine of the law of agency in this state, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

Mr. Ewart in his excellent work on "Estoppel" accepts this statement as declaring a sound principle.⁷ In formulating the rule determining the liability of the principal for the acts of his agent within the latter's apparent authority, he states it thus:⁸

"(A.) If an agent acts within what appears to be his authority, the principal is bound.

(B.) If an agent appears to be acting within his authority, the principal is bound."

According to the New York Courts and Mr. Ewart the liability of the principal for the unauthorized acts of the agent within the rule as thus stated is based upon estoppel. The estoppel is clearly seen in the statement of the rule relating to apparent authority as ordinarily made, and as stated by Mr. Ewart in (A) above, pro-

⁴ 105 U. S. 7, 12.

⁵ 10 C. B. 665, 688, 689. The action was in tort.

⁶ *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195.

⁷ *Ewart on Estoppel* p. 503.

⁸ *Ewart on Estoppel* p. 501.

vided, of course, it be assumed in Mr. Ewart's statement that the acts in question are made to appear to be within the authority of the agent by the words or conduct of the principal, which estop him to deny the truth of the appearance which he himself has brought about. But one looks in vain for any proper support in the principle of estoppel for the rule laid down by the New York court in the above quotation, and by Mr. Ewart in (B). It is a rule too well established to need citation of authority in its support, that declarations or representations made by an agent as to the existence of his own authority are not evidence of his possession of authority.⁹ A third person dealing with an alleged agent has no right whatever to rely upon statements made by the agent as to the extent of his own authority, and the mere fact that the statement made by the agent as to his possession of authority relates to a fact "necessarily and peculiarly within the knowledge of the agent" cannot operate to change this rule. This appears even more clearly from the statement of the latter part of the New York rule, in which it is said, that the third person dealing with the agent in good faith "may rely upon the representation [made by the agent] and the principal is estopped from denying its truth to his prejudice." It seems very remarkable that the principal should be estopped by an unauthorized representation of authority made by his agent without either his knowledge or consent.¹⁰ So likewise Mr. Ewart claims that "if the agent appears to be acting within his authority, the principal is bound." That is, the principal is estopped to deny the agent's authority if the agent, by reason of the character of the act done by the agent, appears to be acting within his real authority. Clearly there can be no estoppel here. In such cases the third person is induced by the words or the acts of the agent himself to suppose that the agent has authority to do the act complained of, and not by the acts or words of the principal, in which case alone an estoppel against the principal could arise.

By applying the same rule of estoppel as that which we have already quoted, the New York courts have decided that a corporation is liable for the wrongful issue by its agent of spurious stock of the corporation, even though such stock be issued wholly without authority of the corporation, even beyond the powers of the corporation, and for the agent's own fraudulent purposes.¹¹ It is claimed

⁹ See *Huffcut on Agency*, Sec. 137.

¹⁰ "It would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business." FULLER, C.J., in *Friedlander v. Texas & Pacific Railway Co.*, 130 U. S. 416, 425.

¹¹ See *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth Avenue Bank v. Ferry Co.*, 137 N. Y. 231.

that such an act is within the apparent authority of the agent for the reason that his authority to issue the stock is dependent upon an extrinsic fact that is necessarily and peculiarly within the knowledge of the agent. Again, it may be clearly seen that these cases of issue of spurious stock present no circumstances that should estop the corporation principal to deny the authority of the agent to make such fraudulent issue, since the corporation has never recognized as valid previous acts of such a character, or done anything else that could be considered as holding out the agent as having such authority. The English courts deny the liability of the principal for such fraudulent issues of stock for the agent's benefit,¹² and while the Supreme Court of the United States has not yet passed upon the exact question, it has expressed its approval of the English cases,¹³ and there can be little doubt that it would take the same relative position with reference to issue of spurious stock as that already taken by it with reference to the issue of spurious bills of lading. The conflict thus shown to exist in regard to this important question between the Supreme Court of the United States and the Court of Appeals of New York, extends throughout the Union, the two doctrines being supported by about an equal number of cases, with, perhaps, the weight of authority slightly in favor of the Supreme Court rule.¹⁴

The great difference in the results reached by the opposing cases, and the great confusion which characterizes the reasoning by which these results are attained, have brought this branch of the law into a most unsatisfactory condition, and suggest that there must be some underlying principle, not yet fully developed, upon which this whole class of cases might be decided in the same way by the courts of all our different jurisdictions, and consistently both with justice and the welfare of commercial interests. It is submitted that this principle has been suggested by WILLES, J., in his judgment in the leading case of *Barwick v. English Joint Stock Bank*,¹⁵ in which he speaks as follows:

"But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business

¹² See *British Mut. Banking Co. v. Charnwood Forest R. Co.*, L. R. 18 Q. B. D. (C. A.) 714.

¹³ *Friedlander v. Texas Pac. R. Co.*, 130 U. S. 415, 426.

¹⁴ The following cases follow the Federal Supreme Court rule: *Hunt v. Mississippi Cent. R. Co.*, 29 La. Ann. 446; *National Bank of Commerce v. Chicago, etc. R. Co.*, 44 Minn. 224; *Hazard v. Illinois Cent. R. Co.*, 67 Miss. 32; *Williams v. Wilmington, etc. R. Co.*, 93 N. C. 42.

Following the New York rule are: *St. Louis, etc. R. Co. v. Adams*, 4 Kan. App. 305; *Smith v. Missouri Pac. R. Co.*, 74 Mo. 47; *Sioux City, etc. R. Co. v. Fremont First Nat. Bank*, 10 Neb. 556; *Brooke v. New York, etc. R. Co.*, 108 Pa. St. 529.

¹⁵ L. R. 2 Exch. 259.

and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

The same principle has been stated by the Supreme Court of the United States in the case of *Philadelphia, Washington & Baltimore Railroad Company v. Quigley*,¹⁶ in which Mr. JUSTICE CAMPBELL, in delivering the opinion of the Court, said:

"That for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

In a later case Mr. JUSTICE PECKHAM expressed a similar opinion:

"The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal."¹⁷

It will be observed that our American cases in considering the liability of the principal for the unauthorized acts of the agent, in cases of the kind we have been discussing, have proceeded upon the theory that the rules of law governing were solely those of principal and agent. As said by JUSTICE MILLER, in *Pollard v. Vinton*,¹⁸ "It is a question of pure agency and depends solely on the power confided to the agent." In accordance with the theory of "pure agency," the principal cannot be held liable for any act of his agent, whether in contract or tort, unless he has either authorized such act, or ratified it, or acted in such a way as to estop himself to deny that he had given the authority which the agent apparently possessed in doing the act complained of. Viewed, therefore, as a question of pure agency, the position of the Supreme Court seems unassailable, and that of the Court of Appeals of New York and of such other states as follow New York, seems unsound, both from the standpoint of authority and reason.

But it is submitted that the question is not at all one of pure agency, and that the theory of authority conferred has no proper application. The question is really one of master and servant, rather than of principal and agent. The difference between a servant and an agent is well settled and familiar. The test is the possession of authority to bring the constituent into contractual relations with

¹⁶ 21 How. 202.

¹⁷ *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 544.

¹⁸ 105 U. S. 7.

third parties. The character of the employment, and the amount of discretion involved in the performance of the services required, are immaterial. Furthermore, it is clear beyond dispute that the same contract of employment may create both the relation of principal and agent and that of master and servant. Thus, the conductor on a street car is, in a very limited capacity, the agent of the company, when, by selling tickets, he makes contracts of carriage on behalf of the company, but the chief duties of his employment, such as starting and stopping a car, and assisting passengers to get on and off the car, are those of a servant. In like manner, the agent of a railway company, having charge of the company's station, is both an agent and a servant. So far as he makes contracts of any character on behalf of the company he acts as an agent, but in the performance of numerous other duties connected with his employment, such as guarding and maintaining order upon the premises, and keeping safe the property of the company, he acts as a servant. The secretary of a corporation, having wide powers, is, perhaps, for most purposes an agent, but in keeping the minutes of the corporation, in keeping its business in order, in the custody of its property, in giving information to the public with regard to its business, and in doing other ministerial acts incident to his office, he is acting as a servant. In all such cases the liability of the constituent for the acts of the representative is to be determined in accordance with the character of the acts done, and not merely by a consideration of the title which the representative may bear. Thus, the liability of a master for any contracts made by his "servant" on the master's behalf will be determined by the law of agency; while the principal's liability for the ministerial acts of his "agent" should be determined by the law of master and servant.

The principle upon which is based the liability of the master for the acts of his servant is materially different from that which underlies the principal's liability for the acts of his agent. The reason for the master's liability is thus well expressed by CHIEF JUSTICE SHAW in the leading case of *Farwell v. Boston & Maine Railroad Co.*:¹⁹

"This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agent or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."

If the master employs a servant to do what he has assumed to do, public policy requires that he shall be held responsible for everything done by the servant in the course of that employment. Whether the

¹⁹ 4 Metc. 49.

servant had authority to do the act in question is immaterial. It is immaterial whether the third person complaining of the servant's acts had any reason to suppose that the servant was authorized by the master to do the act. Indeed, the master may have actually forbidden the servant to do a given act and that prohibition may be well known to the person injured by the servant's disobedience. Yet, if the wrongful act was in the course of the servant's employment, the master is liable. So far as the master's liability for the wrongful acts in the course of the servant's employment is concerned the doctrine of estoppel has no significance. A street railway company may have forbidden its conductors to start their cars before disembarking passengers had gotten entirely out, and this prohibition may be fully known to the public, yet, a passenger injured by a conductor's disobedience of this rule is none the less entitled to his damages. On the other hand, as we have already seen, whether the principal is liable for the acts of his agent, as such, is merely a question of authority actually or apparently confided.

Proceeding upon this theory the courts should determine the liability of the constituent for the acts of the representative strictly in accordance with the character of the act in question. If that act is contractual in its character the constituent as principal should be held liable only in case authority to do the act has been actually or apparently conferred; but if the act is non-contractual the constituent, as master, should be held liable for all acts done by his representative, as servant, in the course of the employment committed to him. This theory is not fanciful, but serves as the real, if not the acknowledged basis for the decisions of many cases both in England and in this country. Thus, in *Barwick v. English Joint Stock Bank*,²⁰ already referred to, the manager of the defendant bank gave to the plaintiff a written statement, from the terms of which the plaintiff was led to believe that the check of a certain person with whom he had dealings would be paid when presented to the bank. On the faith of this statement the plaintiff gave credit to the third party, and when the check received was dishonored at the bank, brought an action in tort against the bank, claiming damages for the deceit. It was contended that the manager of the bank had no authority, either actual or apparent, to make such a fraudulent misstatement as had been issued by him to the plaintiff and that, therefore, the bank could not be held liable for the tort committed. But the court declined to take this view, and held that if the jury should find that fraud had been perpetrated the bank should be liable for it. In so holding the court based the bank's liability on

²⁰ L. R. 2 Exch. 259.

the ground that although the act was unauthorized, it was in the course of the manager's employment, making in the case no distinction between agent and servant, saying, as quoted once before: "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Later, in the same opinion, the court after referring to the various cases²¹ in which railway companies had been held liable for the unauthorized acts of their officers in improperly imprisoning persons whom they erroneously supposed to be violating the by-laws of the company, gave this summary:

"In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Likewise, the reports of the Supreme Court of the United States are full of statements which show that while the court was considering the liability of the so-called principal for the acts of the alleged agent, it had in mind only the rule governing the liability of the master for the acts of his servant. In the *Quigley* case,²² already referred to, the court laid down the rule broadly that a corporation is liable, either in contract or in tort, for the acts of its agent done in the course of his employment, in the same degree as an individual is responsible under similar circumstances. So, in *Lake Shore and Michigan Southern Railway Co. v. Prentice*,²³ the court, in considering the liability of the railway company for the wrongful arrest of the plaintiff by one of the railway company's conductors, speaks of the latter throughout the opinion as an agent, although it is clear that in doing this wrongful act he was merely a servant and not an agent, and that the court had in mind only the rule governing the liability of masters and not that of principals. Thus it is said:

"A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment although the act is done wantonly and recklessly, or against the express orders of the principal."

Again, in *Washington Gas Light Company v. Lansden*,²⁴ in

²¹ "Goff v. Great Northern Ry. Co., 3 E. & E. 672; 30 L. J. (Q. B.) 148, explaining (at 3 E. & E. p. 683) *Roe v. Birkenhead Ry. Co.*, 7 Exch. 36; and see *Barry v. Midland Ry. Co.*, Ir. L. Rep. I C. L. 130."

²² 21 How. 202.

²³ 147 U. S. 101.

²⁴ 172 U. S. 534.

which the company was sued for a libel alleged to have been uttered by its general manager, a judgment in favor of the defendant was based upon the theory that the writing of the libelous letter was not in the course of the manager's employment, although he is spoken of as the agent of the company. The court manifestly applied the rule of master and servant as is shown by this brief extract from its opinion:

"We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself."

Considering as established the proposition that the rule fixing the liability of the master for the acts of his servant shall be applied to all acts of the representative which are non-contractual in their nature, and the rule of agency only to such acts as are contractual, we are prepared to test the results of its application to the cases involving the fraudulent issue of bills of lading and the spurious issue of stock certificates, in which, as we have seen, such unfortunate confusion has arisen. With this in view, let us consider the *Friedlander* case²⁵ and the case of *Bank of Batavia v. The New York, Lake Erie and Western Railway Co.*,²⁶ the facts of which are practically identical. The agent of the railway company having charge of the company's station, and custody of its bill-heads and forms, without the receipt of any goods, and intending to defraud the alleged consignee, issues a bill of lading, upon the faith of which the supposed consignee pays out money. No goods being delivered, the defrauded consignee brings his action for deceit against the railway company. The Supreme Court holds the company not liable because of the absence of any authority, actual or apparent, on the part of the agent to issue such a bill of lading; while the New York Court of Appeals holds the company liable, because of an alleged appearance of authority in the agent. But both courts are proceeding upon the erroneous theory that the liability of the company is to be determined by the law of agency and rests upon the existence of authority, actual or apparent, in the agent to do the wrongful act. An analysis of the facts shows that while a genuine bill of lading is a contract and the agent of the company in issuing a genuine bill of lading does so as an agent of the company, yet, in putting forth an instrument which is not a

²⁵ 130 U. S. 416.

²⁶ 106 N. Y. 195.

genuine bill of lading he is not making a contract at all, but is making a representation to any person who may be expected to pay out money on the faith of it, that the goods mentioned in the bill of lading have been received by the railway company and are actually in its possession, subject to the order of the consignee mentioned. This fraudulent representation is clearly a tortious act, for which the agent himself may be held liable. But the company also is liable for the tort of the agent, not because it was authorized but because the representation was made in the course of the agent's employment. It is true that the representation made by the agent is for the benefit of the agent and not of the company, but it is none the less an act done in the course of his employment and none the less injurious to the person who relied upon it.

In the same way, the secretary of a corporation authorized to counter-sign and issue certificates of stock, when issuing genuine certificates of stock, is acting as an agent in contracting on behalf of his principal; but when issuing spurious certificates, he is making a representation which is likely to mislead, and is intended to mislead third persons who may act upon a belief in the genuineness of such stock. The corporation is liable for such fraudulent misrepresentations by the secretary, not because it has authorized the representations, but because it has intrusted a certain employment to the secretary, in the course of which he is called upon to make representations of this kind. It is the duty of the secretary to give just such information as that upon which those who have taken the spurious stock have relied. He should have made the representations truly, but making them falsely he still makes them as the representative of the company, and they derive their dangerous quality from his representative character. This principle is recognized by the English Court of Appeal in *British Mutual Banking Co. v. Charnwood Forest Railway Co.*,²⁷ but in that case the court took the view that the very fact that the false representation made by the secretary of the corporation was for his own personal benefit and not in the interest of the corporation caused the act to fall without the course of his employment. This view seems unduly narrow, and inconsistent with many other cases to be found in the English reports.²⁸ It is certainly contrary to the great weight of authority in this country, it being well settled here that:

"The rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained

²⁷ L. R. 18 Q. B. D. 714.

²⁸ See especially opinion of ERSKINE, J., in *Sleath v. Wilson*, 9 Car. & P. 607, approved in *P. & R. Ry. Co. v. Derby*, 14 How. 468, 486.

of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule."²⁹

It seems that, in accordance with the American cases at least, the rule of the master's liability may be laid down thus: If the wrongful act done by the servant, is done in his representative capacity, and accords with the general scheme of his employment, the master should be held responsible for the injury done, whether the wrong was committed for the benefit of the master or for the servant's own personal advantage.³⁰ In other words, the locus of the benefit is material only from the standpoint of evidence. This is especially true of employments which place in the hands of the servant peculiar means of doing injury to third persons. Thus, if a servant of a railway company blows his whistle in a spirit of mere wantonness, in order to frighten horses, the master is liable for the damage caused, not on the ground that the wrongful act was done for the master's benefit, for it clearly was not, but because the master's employment of the servant, and his placing him in charge of such a dangerous machine, made it possible for the wrong to be committed.³¹ On the same general principle, a corporation that puts in the hands of its agent blank forms of stock certificates of bills of lading, fully knowing that their misuse is peculiarly dangerous to the commercial community, should be held liable for such misuse irrespective of the question of benefit received.

The English case³² previously referred to also states that the defendant corporation could not become liable for the false representations of its agent because the corporation itself had no power to make such representations, an issue of spurious stock being,

²⁹ *McCord v. Western Union Tel. Co.*, 39 Minn. 181.

³⁰ See *McCord v. Western Union Tel. Co.*, *supra*; *Stewart v. Brooklyn, etc. Ry. Co.*, 90 N. Y. 588.

In *Planters' Rice Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 574, a case involving the liability of a warehouse company for the issue of fictitious receipts by one of its officers, BECKLEY, C.J., expressed the same principle in the following characteristic way:

"An agent to tell the truth may bind his principal by telling a lie. A wrongful exercise of delegated authority is not the assumption of authority, but the abuse of it. Thus an agent empowered to issue and acknowledge receipts of a given kind, based on real transactions, does not, by wrongfully issuing and acknowledging receipts of a like kind, based on fictitious and simulated transactions, pass beyond the scope of his authority, but acts fraudulently within it. To hold otherwise would be to rule that an agent cannot commit a fraud and affect his principal by it. Here he had a rightful authority to do a certain class of acts. He did a number of those acts by the wrongful exercise of that authority. His principal must be responsible both for the authority conferred and for its faithful exercise, in so far as there is a right to rely upon the fidelity of its exercise."

³¹ *Tex. & Pac. R. Co. v. Scoville*, 62 Fed. 730; *Bittle v. Camden & A. R. Co.*, 55 N. J. L. 615; *Georgia R. Co. v. Newsome*, 60 Ga. 492; *Skipper v. Clifton Mfg. Co.* 58 S. C. 143.

See also *Pittsburg, etc. R. Co. v. Shields*, 47 Oh. St. 387.

³² *British Mut. Banking Co. v. Charnwood Forest R. Co.*, L. R., 18. Q. B. D. 714.

of course, *ultra vires* of the corporation. Such a view, however, is certainly not consistent with reason and arises from confusing a corporation's power with its authority. A corporation never has *authority* to commit any tort whatsoever, and yet, it has *power* to do so and often does in fact commit torts, and its liability for such commission is generally recognized.³³ Therefore, it is idle to say that the corporation may not be held liable for a false representation which it had no authority to make.

We are next to consider how the principle which, as we have just seen, renders the constituent liable in an action in tort for such acts of the representative as are within the course of his employment, may be applied to actions brought against the constituent in contract, as, for instance, where a consignee who has advanced money on the faith of a spurious bill of lading, brings his action on the contract set forth in the bill. Here, it would seem at first, as if the plaintiff, declaring in contract, must be held to admit that the representative was acting in a contractual capacity and that the transaction is, therefore, subject to the rule of agency, and the rights of the parties dependent upon the question of authority conferred. But such is only apparently the case. Indeed, we should be much surprised if we should find that, in a case where the plaintiff had his election to sue, either in contract or in tort, for the enforcement of the same right, he could enforce the right in one form of action and not in the other. Accordingly, we find that the same principle that we have already found applicable in tort is equally effective when the action is in contract. Retaining the case of the fraudulent issue of a bill of lading for illustration, this may easily be made apparent. The false representation made by the representative of the railway company, being made in the course of his general employment, becomes as fully binding upon the railway company as if made by the company itself. If it were possible for the company itself to make such a false representation with reference to goods received, it is manifest that it would be estopped to take advantage of its own fraud and deny the receipt of the goods and the validity of its promise to deliver them to the alleged consignee. The company here is not estopped to deny the authority of the agent to make the contract in question, but it is estopped to allege in defense of an action in contract the fraud of its agent perpetrated in the course of his employment. It is admitted that no contract has actually been made, since the agent had neither actual nor apparent authority to make the contract for the delivery of goods without their receipt, yet, the company is estopped, by

³³ See *Farmers' & Mech. Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125. Also *McCord v. Western Union Tel. Co.*, *supra*.

reason of the fraudulent misrepresentation with which it is chargeable as master, to take advantage of the fact that there is no contract.

It is believed that the above discussion establishes the following propositions:

I. The constituent, whether called principal or master, is liable for all non-contractual acts done by his representative, whether called agent, servant, or by any other title, that are within the scope of the latter's employment, without reference to authority conferred.

II. The liability of the constituent for such acts of his representative depends only upon the existence (1) of a wrongful act done **within the scope of the representative's employment**; and (2) a legal injury caused thereby to the plaintiff.

III. No question as to the authority conferred upon the representative being involved, attempted limitations upon the power of the representative to do ministerial acts, or the total prohibition of such acts by the constituent, do not affect the liability of the constituent for the injury actually done within the scope of the representative's employment.

These principles have a wide application, extending far beyond the range of the special cases with reference to which they have been considered. Thus, a telegraph company is properly held liable for the fraud perpetrated by its agent in sending a false telegram, whereby the plaintiff was induced to send money in accordance with the direction of such fraudulent message.³⁴ Of course the agent of the telegraph company is not actually or apparently authorized to send such a message, but his act in doing so clearly falls within the general scope of his employment, and therefore, renders liable the principal irrespective of any question of authority. So the teller of a bank, who is authorized to certify checks only when the drawer has funds in the bank, may impose liability upon the bank by certifying a check in the absence of funds to the credit of the drawer, if some third person, acting in good faith, has been injured by such a false certificate.³⁵

By far the broadest and most important application of these principles may, however, be made to certain cases involving the rights of parties to contracts of insurance. The ordinary solicitor of life insurance for the most part renders non-contractual services to his company. He distributes the advertising literature of the company, gives information as to its rates and policies, and makes himself generally active in inducing persons to apply for contracts with the company. When he finally succeeds in inducing a person

³⁴ *McCord v. Western Un. Tel. Co.*, 39 Minn. 181.

³⁵ *Farmers' & Mech. Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125.

to apply for insurance he does not even then, in the ordinary case, enter into any sort of contract on behalf of the company. He merely secures from the applicant his signature to a certain form, in which the solicitor has filled in answers to questions, with greater or less accuracy and fidelity, in accordance with the temperament and character of the solicitor. In doing all these acts there can be no question but that the solicitor is acting on behalf of the insurance company,³⁶ but it is equally clear that in doing them he is acting in a ministerial and not in a contractual capacity. Therefore, we easily conclude that any false representations made by the agent in the course of these negotiations, provided it concerns the business in hand, is chargeable to the insurance company without any reference to the authority actually conferred upon the solicitor. Given the false representation or other fraudulent act of the agent, done in the course of his employment in securing business for the company, and the fact that the third party has been actually misled to his prejudice, we have all of the conditions imposing liability upon the company. Suppose, however, that the company has taken the precaution to include within the written terms of the application, in a clause appearing just above the applicant's signature, a statement intended as notice to the applicant that the solicitor has no authority to make any representation with reference to the matters contained in that application, or to acquire any knowledge with reference to them. The Supreme Court of the United States has held that such limitations are binding upon the applicant to such an extent that the company will not be responsible for the fraudulent misrepresentations of the solicitor, even though they may clearly mislead the applicant, to his great prejudice.³⁷ Such a holding, however, is entirely contrary to the principles which, as we have seen, properly govern these cases, and is opposed to the great weight of authority in this country.³⁸ A railway company is not less liable to a passenger who has been wrongfully ejected from a train by its conductor because of the passenger's knowledge that the conductor's authority was limited to ejecting passengers only for good cause. Neither would a principal be able to escape liability for a libel published by his agent in the course of his employment by showing that the injured person knew that the libel

³⁶ *Union Mut. Life Insurance Co. v. Wilkinson*, 13 Wall. 222. See p. 234 for Mr. Justice MILLER's picturesque description of the activities of the insurance solicitor.

³⁷ See *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; also *Northern Assurance Co. v. Grand View Bldg. Assn.*, 183 U. S. 308. As showing the instability of the Supreme Court rule the two rightly decided cases, *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, and *Supreme Lodge v. Withers*, 177 U. S. 260, are especially interesting.

³⁸ *Continental Life Ins. Co. v. Pearce*, 39 Kan. 396; *Sternaman v. Ins. Co.* 170 N. Y. 13; *Endowment Rank v. Cogbill*, 99 Tenn. 28; *Massachusetts Ben. Life Assn. v. Robinson*, 104 Ga. 256; *Royal Neighbors v. Boman*, 177 Ill. 27.

was unauthorized. Exactly the same principle applies to insurance cases, such as the *New York Life Insurance Company v. Fletcher*.³⁹ If the agent, while acting in the scope of his employment, does as a matter of fact deceive the insured by writing in the application a false answer, when a true one was actually given him, or by perpetrating any other fraud upon the applicant, the insurance company is chargeable with its representative's fraud, wholly without reference to any attempted limitations upon his powers to perpetrate fraud, provided always that the applicant is not so negligent as to subject himself to the imputation of bad faith. Being thus chargeable with the fraud of the agent, the insurance company is estopped in a subsequent action brought on the contract, to take advantage of its own fraud by claiming a forfeiture based upon mis-statements for which, through its agent, it is responsible.⁴⁰

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³⁹ The Fletcher case was probably rightly decided on the facts. The good faith of the insured was at least doubtful, and, of course, he would have no right to charge an estoppel against the insurance company by showing misrepresentations that did not, in fact, mislead.

⁴⁰ See the cases cited in note No. 38.